BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CALVIN D. BROWN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,030,317
OLIVE GARDEN	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 16, 2010, Award of Administrative Law Judge Rebecca A. Sanders (ALJ). Claimant was found to be permanently and totally disabled as the result of the accident which occurred on July 12, 2006, injuring his upper extremities.

Claimant appeared by his attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Andrew D. Wimmer of Kansas City, Missouri.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on July 21, 2010.

ISSUE

What is the nature and extent of claimant's injuries and disability? Claimant was found to be permanently and totally disabled by the ALJ as a result of the work-related injuries to his arms. Respondent contends that claimant is capable of working in the open labor market and, therefore, should be limited to two scheduled injuries under K.S.A. 44-510d. Respondent further contends that claimant's injuries to his arms only partially disabled him. Thus, as claimant has not suffered a total loss of use of the arms nor an

amputation, claimant cannot be totally disabled and is limited to two scheduled injuries. Claimant contends that a total loss or an amputation is not required under K.S.A. 44-510d. Under *Casco*[1], claimant has only to prove a loss of use of each extremity to qualify for the presumption created in the statute. Claimant goes on to argue that respondent has failed to overcome the presumption that claimant is permanently and totally disabled from the injuries suffered on July 12, 2006.

FINDINGS OF FACT

Claimant began working for respondent in February or March 2006 as a dishwasher. On July 12, 2006, while performing his duties, claimant suffered a serious injury. Claimant picked up a stainless steel screen in order to put it on a shelf. The screen, which weighed about 70 pounds, fell from the shoulder-high shelf and hit claimant on the inside of both elbows, causing injury to both elbows with resulting nerve damage. Claimant was referred for medical treatment. He underwent conservative treatment and was returned to work at light duty by the original authorized physician, Donald T. Mead, M.D. Claimant testified that he was required to exceed his light-duty restrictions by respondent. Claimant last worked for respondent on July 29, 2006. Claimant was referred by respondent to Craig L. Vosburgh, M.D., for an evaluation on July 19, 2006. Claimant was diagnosed with contusions of the elbows bilaterally. He was provided work restrictions and referred to physical therapy.

Claimant ultimately underwent surgery to his upper extremities bilaterally at the elbow level for decompression of the ulnar nerves to repair the cubital tunnel damage resulting from the accident. The left upper extremity surgery, under the care of board certified plastic surgeon and hand surgeon Regina M. Nouhan, M.D., was performed in September 2007, followed by right upper extremity surgery in October 2007. After the surgery, claimant continued to experience problems with his upper extremities at the elbow level. Claimant underwent physical therapy with little benefit.

EMGs performed on July 13, 2007, by board certified physical medicine and rehabilitation specialist Zhengyu Hu, M.D., indicated mild carpal tunnel syndrome on the left side. When claimant was examined by Dr. Nouhan on June 30, 2009, carpal tunnel surgery was discussed for claimant's left upper extremity. Claimant declined. Symptoms of carpal tunnel syndrome were indicated bilaterally. Grip strength testing on June 30, 2009, showed a decrease bilaterally. On July 31, 2009, Dr. Nouhan recommended a steroid injection. However, the injection was never approved. Dr. Nouhan last examined claimant on August 6, 2009, for a final check. Nothing further surgically was recommended. Dr. Nouhan requested an FCE on claimant, but none had been performed by the time of her last examination of claimant. Without the FCE, Dr. Nouhan was

[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

unwilling to speculate if claimant needed permanent restrictions or a permanent impairment rating.

When Dr. Hu performed repeat EMG tests on July 28, 2009, the studies indicated improvement of the carpal tunnel syndrome bilaterally. At that time, the only finding seen on the nerve conduction study was the left ulnar sensory mild abnormality. The entrapment neuropathy on the left side, found in July 2007, was gone. Dr. Hu did not find claimant to have significant impairment as of July 2009. He found no basis to assess any disability.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Lynn A. Curtis, M.D., for evaluations on August 2, 2006, October 23, 2006, and finally August 20, 2008. Claimant was diagnosed with a brachial stretch injury, bone contusions in both upper extremities, double crush syndrome with cubital tunnel syndrome in his elbows and post surgical transposition of the ulnar nerve in his elbows bilaterally. Dr. Curtis was provided with only x-rays from 2006. None of the EMG tests performed on claimant were made available. In fact, Dr. Curtis testified that no EMG studies were ever performed on claimant.[2] Dr. Curtis opined that claimant had not reached maximum medical improvement (MMI), but, nevertheless, elected to rate claimant pursuant to the fourth edition of the AMA *Guides*.[3] Dr. Curtis found claimant to have suffered a 7 percent impairment to the right upper extremity for ulnar nerve sensory loss, and a 12 percent impairment to the right upper extremity for motor loss. Because claimant had a stretch injury to the nerves, claimant had a 19 percent impairment for loss from motor weakness and a 6 percent impairment for sensory loss. These ratings all combine for a 35 percent impairment to the right upper extremity, which equates to a 21 percent whole person impairment. Dr. Curtis further testified that, in his opinion, claimant is permanently and totally disabled.

Claimant was referred by the ALJ to board certified disability evaluating physician Peter V. Bieri, M.D., on December 4, 2008. Dr. Bieri found claimant to be post surgery bilaterally at the elbow level. Both Phalen's and Tinel's tests were negative at the wrists, bilaterally. The grip strength measurements with the JAMAR dynamometer were invalid. Dr. Bieri's report of December 4, 2008, indicated an FCE had been performed on claimant, but it was considered invalid. Vascular integrity was intact, and deep tendon reflexes were normal. Dr. Bieri rated claimant at 10 percent to the upper extremities bilaterally for the residuals of mild ulnar nerve entrapment at the elbows, pursuant to the fourth edition of the AMA *Guides*.[4] Claimant was given no restrictions by Dr. Bieri other than to function within

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[2] Curtis Depo. at 20-21.

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[4] AMA *Guides* (4th ed.).

tolerance of symptomatology, and to limit repetitive gripping and grasping to no more than frequently. Dr. Bieri was unwilling to express an opinion as to whether claimant was or was not employable, testifying that such a question is better left to the vocational expert.

Claimant was referred by his attorney to vocational expert Richard W. Santner for an evaluation on July 22, 2008. Mr. Santner found claimant to have attended high school through the 9th grade without a GED. Claimant testified that he was in special education classes but this record fails to explain why. Claimant had obtained his certification as a nurse aide in 1991 but that certification had expired. Claimant had no other formal education, work-related licenses or certifications. Claimant was not working at the time of the evaluation and was on Social Security disability. Mr. Santner was unable, at that time, to provide an opinion as to claimant's post-injury earning potential as he had been provided no medical records. At his deposition, on February 2, 2010, Mr. Santner was provided the medical reports of Dr. Curtis. After reviewing the records, Mr. Santner determined that, based on the report of Dr. Curtis, claimant was unlikely to be employable. On cross-examination, he acknowledged that, based on the opinion of Dr. Bieri, claimant could be employed.

Claimant was referred by respondent to clinical psychologist and rehabilitation counselor Robert W. Barnett, Ph.D., for an evaluation on February 26, 2010. Dr. Barnett acknowledged that claimant's education was limited with the completion of the 9th grade only. Additionally, claimant had, for the most part, performed only physically demanding jobs. After considering the limited restrictions provided by Dr. Curtis and Dr. Bieri, Dr. Barnett determined that claimant would be employable in the sedentary-light occupational category. He acknowledged that claimant's job prospects were limited, but testified that claimant could go to a job service center for job placement assistance. Dr. Barnett testified that claimant would be able to do unarmed security work within his restrictions. Dr. Barnett also estimated that claimant's IQ was in the 70 to 80 range, with mental retardation being below 70. Claimant was estimated to be mildly mentally retarded.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

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[5] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[8]

Claimant contends that the injuries to his upper extremities have rendered him permanently and totally disabled. As noted in *Casco*[9], there is a presumption of permanent total disability when a worker suffers a loss of both upper extremities. However, this presumption is rebuttable. In this instance, claimant was found by Dr. Curtis to be permanently and totally disabled, but Dr. Curtis also determined that claimant had not reached maximum medical improvement at the time of his evaluation and rating. Dr. Bieri determined that claimant was employable, as did Dr. Barnett. Even Mr. Santner, when considering the restrictions of Dr. Bieri, acknowledged that claimant was employable.

Respondent argues that in order for a claimant to qualify for total disability, K.S.A. 44-510c requires that the claimant suffer either a total loss of the extremity or an amputation of the extremity. Simple bilateral injuries to the extremities is not sufficient, according to respondent, for the presumption to come into play. However, the Kansas Supreme Court, in *Casco*, was asked to consider if a claimant was permanently and totally disabled while only suffering a loss of function to both arms. The Court determined that a claimant with a less than 100 percent loss of each upper extremity can qualify as permanently and totally disabled under K.S.A. 44-510c. Total loss of the extremities or an amputation of the extremities is not required in order to bring the statutory presumption into play.

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[7] K.S.A. 2006 Supp. 44-501(a).

[8] K.S.A. 44-510c(a)(2).

[9] *Casco, supra.*

Here, however, the presumption of permanent total disability has been rebutted. The opinions of Dr. Bieri and Dr. Barnett are the most persuasive regarding claimant's ability to perform substantial and gainful employment. As such, claimant's award must be calculated as a permanent partial disability under K.S.A. 44-510d(a)(13).

Dr. Bieri rated claimant at 10 percent impairment to each upper extremity for the residuals of the ulnar nerve entrapment. The Board finds the opinion of Dr. Bieri to be the most persuasive in this record. As such, claimant will be awarded a 10 percent functional disability to each upper extremity at the level of the arm for the injuries suffered on July 12, 2006. The award of the ALJ will be modified accordingly. For purposes of computation, claimant's 64.52 total weeks of temporary total disability compensation will be divided equally between his two scheduled injuries, thereby apportioning 32.26 weeks of temporary total disability benefits to each.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 10 percent functional disability to each upper extremity at the level of the arm, based on the medical opinion of Dr. Bieri. Respondent has successfully rebutted the presumption that claimant is permanently and totally disabled under K.S.A. 44-510c.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca A. Sanders dated April 16, 2010, should be, and is hereby, modified to award claimant a 10 percent functional disability to each upper extremity at the level of the arm for the injuries suffered on July 12, 2006.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Calvin D. Brown, and against the respondent, Olive Garden, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred on July 12, 2006, and based upon an average weekly wage of $346.87.

Right Upper Extremity

Claimant is entitled to 32.26 weeks of temporary total disability compensation at the rate of $231.26 per week totaling $7,460.45, followed by 17.77 weeks of permanent partial disability compensation at the rate of $231.26 per week totaling $4,109.49 for a

10 percent permanent partial disability to the right upper extremity at the level of the arm, making a total award of $11,569.94.

As of the date of this Order, the entire amount of this award is due and owing and ordered paid in one lump sum less any amounts previously paid.

Left Upper Extremity

Claimant is entitled to 32.26 weeks of temporary total disability compensation at the rate of $231.26 per week totaling $7,460.45, followed by 17.77 weeks of permanent partial disability compensation at the rate of $231.26 per week totaling $4,109.49 for a 10 percent permanent partial disability to the left upper extremity at the level of the arm, making a total award of $11,569.94.

As of the date of this Order, the entire amount of this award is due and owing and ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of August, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge